

Exhibit A

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CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA

1 Grant Woods (AZ Bar No. 006106)

2 **GRANT WOODS, PC**

3 1726 North Seventh Street

4 Phoenix, Arizona 85006

5 Telephone: (602) 258-2599

6 Facsimile: (602) 258-5070

7 Robert B. Carey (AZ Bar No. 011186)

8 Stephanie Levin Bozzo (AZ Bar No. 018470)

9 **HAGENS BERMAN SOBOL SHAPIRO PLLC**

10 2425 E. Camelback Road, Suite 650

11 Phoenix, Arizona 85016

12 Telephone: (602) 840-5900

13 Facsimile: (602) 840-3012

14 Daniel C. Girard

15 Aaron M. Sheanin

16 Sanjay M. Ranchod

17 Stefanie G. Bernay

18 **GIRARD GIBBS & De BARTOLOMEO LLP**

19 601 California Street, Suite 1400

20 San Francisco, California 94108

21 Telephone: (415) 981-4800

22 Facsimile: (415) 981-4846

23 Attorneys for Individual and Representative Plaintiff

24 **UNITED STATES DISTRICT COURT**
25 **DISTRICT OF ARIZONA**

26 SHARY EVERETT, on behalf of herself and
27 all others similarly situated,

28 Plaintiff

v.

MCI, INC., a Delaware Corporation,

Defendant.

Case No. **CV'05 2122 PHX ROS**

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

CLASS ACTION COMPLAINT

E-FILED

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1 Plaintiff Shary Everett, on behalf of herself and all others similarly situated throughout
2 the United States, alleges by and through her attorneys, upon information and belief, as follows:

3 **JURISDICTION AND VENUE**

4 1. This action asserts claims for violations of the Communications Act of
5 1934, as amended, 47 U.S.C. §§ 151, et seq.; and for unjust enrichment. This court has
6 jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1332(d), and pursuant to
7 47 U.S.C. § 207. This court has supplemental jurisdiction over the state law claims pursuant to
8 28 U.S.C. § 1367.

9 2. Venue in this judicial district is proper pursuant to 28 U.S.C. § 1391(b)(2) because
10 a substantial number of the acts giving rise to the violations of law complained of herein
11 occurred and had their primary effect in this judicial district.

12 **NATURE OF THE CASE**

13 3. This is a class action on behalf of all persons in the United States who were billed
14 by MCI, Inc. ("MCI") for monthly service charges and related taxes, regulatory fees, and other
15 charges despite the fact they did not have an active account with MCI or an ongoing business
16 relationship with MCI at any relevant time. Many of the persons who were billed by MCI
17 without authorization are former MCI subscribers. Other persons who were billed by MCI
18 without authorization never have been MCI subscribers. Plaintiff had no contractual
19 relationship with MCI at the time she was billed by MCI for monthly service charges.

20 4. Consumers who have detected unauthorized charges from MCI in their telephone
21 bills and attempted to dispute the charges report that MCI representatives often refuse to
22 reverse, refund, or credit back the charges. Consumers who do not pay unauthorized charges
23 are turned over to collections agencies.

24 5. On behalf of herself and all similarly situated persons throughout the United
25 States, Plaintiff brings claims for violations of the Communications Act of 1934, as amended,
26 47 U.S.C. §§ 151, et seq. ("Communications Act"), and for unjust enrichment. This action seeks
27 to recover, among other things, damages sustained by Plaintiff and the Class as a result of
28 MCI's practice of assessing monthly service charges and related fees without authorization to

1 non-MCI customers; equitable relief; and declaratory relief.

2 **THE PARTIES**

3 6. Plaintiff Shary Everett is a resident of Goodyear, Arizona.

4 7. Defendant MCI, Inc. is a Delaware corporation that provides local and long
5 distance telephone service to customers in the State of Arizona and throughout the United
6 States, and maintains offices and facilities within the State of Arizona.

7 **FACTUAL ALLEGATIONS**

8 8. Consumers throughout the United States contract with local exchange carriers
9 (LECs) to provide them with local telephone services. The LECs provide monthly bills for
10 local telephone services to such consumers. MCI has agreements with LECs throughout the
11 United States pursuant to which LECs permit MCI to include bills for long distance service
12 along with the monthly telephone bills the LECs issue to consumers for local telephone service.
13 For other consumers, MCI assesses charges for long distance service on separate bills that it
14 sends directly to consumers. These bills, whether issued by a LEC or by MCI, represent that
15 certain telephone charges have been incurred by the consumer, and that payment is due from
16 the consumer for such charges.

17 **Defendant MCI's Unlawful Practice of Billing Non-Customers For Monthly Charges**

18 9. MCI bills consumers without their authorization for monthly service charges and
19 related taxes, regulatory fees, and other charges even though these consumers do not have an
20 active account with MCI or an ongoing business relationship with MCI. The consumers who
21 receive the bills in question are not MCI customers, have not used MCI services at any relevant
22 time, and have instead either contracted for long distance service with carriers other than MCI
23 or canceled their long distance service.

24 10. MCI misuses data it purchases from LECs to generate bills for consumers whom it
25 has no reasonable basis to believe are current MCI customers. The data MCI receives from
26 LECs include codes and/or other information that reveal the subscriber status of telephone lines.

27 11. A telephone line may be designated to the MCI network even though MCI is not
28 maintaining an active account with the owner of that line. Former MCI subscribers who

1 canceled their MCI service but did not also advise their LEC of the change may remain
2 designated to the MCI network. Such a consumer who remains designated to the MCI network
3 would appear to have an inactive MCI account because he or she would not have made any
4 long distance calls through MCI. A person who never has been an MCI subscriber but who has
5 been designated to the MCI network similarly would appear to have an inactive MCI account.

6 12. MCI identifies inactive accounts by comparing the data it receives from LECs to
7 its own lists of active accounts. For telephone lines that have an inactive MCI account or that
8 do not have any MCI account, MCI either uses the inactive account to bill the owner of that line
9 or creates a new account for that line through which it can bill the owner of that line. MCI does
10 so without the knowledge, consent, or authorization of the owners of these telephone lines.

11 13. MCI does not verify whether a consumer had previously canceled or terminated
12 their MCI service or whether a consumer had previously requested cancellation or termination
13 of their MCI service. MCI does not verify whether a consumer intends to switch their long
14 distance service to MCI or subscribe to MCI as their preferred long distance carrier.

15 14. MCI uses an inactive account or creates a new account for a telephone line to bill
16 the owner of that line, as described above, by enrolling the telephone line and/or the owner of
17 that line in the "Basic Dial-1" long distance plan or another MCI long-distance calling plan that
18 carries a monthly service charge. MCI then indicates to the relevant LEC that the owner of that
19 line intends to establish a new account with MCI that carries a monthly service charge when, in
20 fact, the consumer does not. Plaintiff and Class members did not affirmatively select an MCI
21 long distance plan that carries a monthly service charge at any relevant time, and they were
22 enrolled in such a plan without their knowledge, consent, or authorization.

23 15. Since 2002, MCI has charged a minimum usage fee ("MUF") to persons enrolled
24 in its "Basic Dial-1" long distance plan. Persons who did not generate bills for long distance
25 telephone calls in a given month equal to or exceeding \$3.00 or \$5.00 were charged the
26 difference between the amount of charges for long distance telephone calls they made and the
27 amount of the minimum usage fee. MCI also has charged a \$3.95 monthly recurring fee, which
28

1 is charged regardless of the amount of bills for long distance telephone calls generated in a
2 given month, to persons enrolled in its "Basic Dial-1" long distance plan.

3 16. According to internal MCI documents, MCI established the MUF program for its
4 "Basic Dial-1" long distance plan "to generate an additional \$24.6M in revenue through the
5 application of the new \$3 minimum usage fee." This revenue would not otherwise be generated
6 because the MUF was to be applied to persons with no usage on the MCI network. MCI
7 established the MUF program because not doing so would "unnecessarily avoid[] a significant
8 source of additional revenue from this customer segment." MCI has acknowledged that it
9 could have avoided assessing monthly service charges and related fees without authorization,
10 but did so because it could generate tens of millions of dollars in additional revenue.

11 17. MCI did not obtain valid authorization at any relevant time from members of the
12 Class to enroll them in an MCI long distance plan that carries a monthly service charge prior to
13 assessing them monthly service charges and related fees. Plaintiff and other Class members
14 have not consented to pay a monthly service charge or related fees in connection with MCI long
15 distance service at any relevant time.

16 18. During the Class period, MCI placed unauthorized monthly service charges and
17 related taxes, regulatory fees, and other charges on bills distributed by LECs to consumers
18 throughout the United States. For other consumers, MCI placed unauthorized monthly service
19 charges and related taxes, regulatory fees, and other charges on separate bills that it issued
20 directly to consumers throughout the United States.

21 19. MCI has assessed a monthly service charge, including an MUF and monthly
22 recurring fee, without authorization to a staggering number of consumers nationwide. In
23 California alone, MCI assessed an MUF to approximately 500,000 consumers between June
24 2002 and February 2004.

25 20. MCI's unlawful practice described herein affects former MCI long distance
26 subscribers who cancel MCI long distance service and switch their long distance service to
27 another carrier, former MCI long distance subscribers who cancel MCI long distance service
28

1 and do not select a new long distance carrier, and persons who have never been MCI
2 subscribers. This practice also affects persons who have a secondary telephone line that has
3 never been subscribed to MCI.

4 21. MCI has obstructed the efforts of consumers to obtain credits, adjustments
5 or refunds of the improper charges. Consumers complain that in response to requests for
6 refunds and corrections to MCI billing records MCI representatives promise refunds and
7 corrections which are subsequently not made, that MCI issues "credits" to consumers who are
8 not MCI customers and thus cannot use the credits, and that even if MCI issues a credit or
9 refund for unauthorized charges, the unauthorized charges reappear in subsequent billing
10 statements or MCI imposes new, unauthorized charges in later billing periods.

11 22. MCI's policy and practice is to reverse, refund, or credit back unauthorized
12 charges only to persons who threaten to bring legal action, lodge complaints with regulatory
13 authorities, or take other action in response to being billed without authorization by MCI.
14 Consumers who do not pay unauthorized charges are turned over to collections agencies.

15 **Plaintiff Shary Everett's Experience**

16 23. At all relevant times, Plaintiff Shary Everett had residential telephone service
17 through Qwest and had either long distance service through AT&T or no long-distance service.

18 24. Mrs. Everett has not contracted with MCI or obtained services from MCI at any
19 time since approximately 1999, when she terminated MCI long distance service on a telephone
20 line at a previous address.

21 25. Beginning in or around February 2003 and continuing thereafter, MCI assessed
22 Mrs. Everett a monthly service charge and related charges in connection with an MCI long
23 distance plan. The charges were not incurred or authorized by Mrs. Everett.

24 26. On several occasions, Mrs. Everett attempted to have the unauthorized MCI
25 charges reversed or removed and/or to stop MCI from billing her for unauthorized charges.
26 When she called MCI, its representatives refused to reverse or remove the unauthorized MCI
27 charges assessed to her. MCI continued to assess Mrs. Everett charges without authorization.
28

27. In or around July 2003, Mrs. Everett received a collections notice for failure to pay unauthorized charges assessed by MCI.

28. Mrs. Everett subsequently paid unauthorized charges assessed by MCI. To prevent MCI from continuing to bill her for unauthorized charges, Mrs. Everett terminated her AT&T long distance service and restricted all long distance service on her telephone line.

29. MCI has not refunded the unauthorized charges paid by Mrs. Everett.

CLASS ACTION ALLEGATIONS

30. Plaintiff brings this action on behalf of herself and all other similarly situated persons throughout the United States as members of a proposed plaintiff Class initially defined as:

All persons and entities who, on or after July 18, 2001, (1) were assessed or paid non-usage monthly charges in connection with an MCI calling plan and (2) were not MCI customers at the time the charges were assessed.

Excluded from the Class are persons who filed complaints with the Federal Communications Commission, in compliance with 47 C.F.R. 1.716, 1.719, 1.720, or 1.721, regarding Defendant's conduct alleged herein; Defendant; any entity in which Defendant has or had a controlling interest; any officers or directors of Defendant; the legal representatives, heirs, successors, and assigns of Defendant; and any judge assigned to this action and his or her immediate family.

31. This action has been properly brought and may properly be maintained as a class action under Rule 23(a)(1)-(4) and Rule 23(b)(1) or (2) or (3) of the Federal Rules of Civil Procedure and case law thereunder.

Numerosity of the Class (Fed. R. Civ. P. 23(a)(1))

32. Members of the Class are so numerous that their individual joinder is impracticable. Plaintiff estimates that the Class comprises at least tens of thousands of members. The precise number of Class members and their addresses are unknown to Plaintiff at this time, but can be ascertained from MCI's records. Class members may be notified of the

pendency of this action by mail, supplemented (if deemed necessary or appropriate by the Court) by published notice.

Existence and Predominance of Common Questions of Fact and Law
(Fed. R. Civ. P. 23(a)(2); 23(b)(3))

33. Common questions of law and fact exist as to all members of the Class. These questions predominate over the questions affecting only individual Class members. These common legal and factual questions include:

- (a) Whether MCI has assessed non-usage monthly charges on telephone lines without the end-user's authorization;
- (b) Whether MCI has enrolled end-users in calling plans that carry a monthly service charge without their authorization;
- (c) Whether MCI's assessment of charges on telephone lines without authorization violates the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, *et seq.*;
- (d) Whether MCI was unjustly enriched by the charges it collected on telephone lines without authorization; and
- (e) The nature of the relief, including damages, equitable and declaratory relief, to which Plaintiff and Class members are entitled.

Typicality of Claims
(Fed. R. Civ. P. 23(a)(3))

34. Plaintiff's claims are typical of the claims of the Class because Plaintiff, like all other Class members, was assessed monthly service charges by MCI on one or more telephone lines without her authorization.

Adequacy of Representation
(Fed. R. Civ. P. 23(a)(4))

35. Plaintiff is an adequate representative of the Class, because her interests do not conflict with the interests of the Class members she seeks to represent, and she has retained counsel competent and experienced in complex class action and telecommunications litigation.

1 The interests of the Class members will be fairly and adequately protected by Plaintiff and her
2 counsel.

3 **Superiority of the Class Action**
4 **(Fed. R. Civ. P. 23(b)(3))**

5 36. A class action is superior to other available means for the fair and efficient adjudication
6 of this dispute. The damages suffered by each individual Class member may be small, especially given
7 the burden and expense of individual prosecution of the complex and extensive litigation necessitated
8 by MCI's conduct. It would be virtually impossible for Class members individually to obtain effective
9 redress for the wrongs done to them. Furthermore, even if the Class members themselves could afford
10 such individual litigation, the court system could not. Individualized litigation presents a potential for
11 inconsistent or contradictory judgments. Individualized litigation increases the delay and expense to all
12 parties and to the court system presented with the complex legal and factual issues of this case. By
13 contrast, the class action device presents far fewer management difficulties, and provides the benefits of
14 single adjudication, economy of scale, and comprehensive supervision by a single court.

15 **The Risk of Inconsistent or Dispositive Adjudications and**
16 **the Appropriateness of Final Injunctive or Declaratory Relief**
17 **(Fed. R. Civ. P. 23(b)(1) and (2))**

18 37. In the alternative, this action may properly be maintained as a class action,
19 because:

- 20 (a) the prosecution of separate actions by individual Class members would
21 create a risk of inconsistent or varying adjudication with respect to
22 individual Class members, which would establish incompatible standards
23 of conduct for MCI; or
- 24 (b) the prosecution of separate actions by individual Class members would
25 create a risk of adjudications with respect to individual members of the
26 Class which would, as a practical matter, be dispositive of the interests of
27 other Class members not parties to the adjudications, or substantially
28 impair or impede their ability to protect their interests; or

1 (c) MCI has acted or refused to act on grounds generally applicable to the
2 Class, thereby making appropriate final injunctive or corresponding
3 declaratory relief with respect to the Class members as a whole.
4

5 **FIRST CAUSE OF ACTION**

6 (Violations of the Communications Act of 1934, 47 U.S.C. § 201)

7 38. Plaintiff incorporates by reference and realleges each of the foregoing paragraphs
8 as if fully set forth herein, and further alleges as follows:

9 39. Plaintiff asserts this claim against MCI on behalf of herself and all Class members
10 for violations of 47 U.S.C. § 201.

11 40. 47 U.S.C. § 201(b) states, "All charges, practices, classifications, and regulations
12 for and in connection with such communication service [i.e., service for interstate or foreign
13 communication by wire or radio], shall be just and reasonable, and any such charge, practice,
14 classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

15 41. In violation of 47 U.S.C. § 201(b), it is unjust or unreasonable for MCI to bill
16 persons who have no contractual relationship with MCI for services they have not requested or
17 received, and that MCI has not provided.

18 42. In violation of 47 U.S.C. § 201(b), it is unjust or unreasonable for MCI to bill
19 persons monthly service charges in connection with an MCI calling plan who do not have an
20 active MCI account and who have not agreed to enroll in said calling plan.

21 43. Plaintiff and Class members have been injured as a result of MCI's above-
22 described violations of 47 U.S.C. § 201 in an amount to be determined according to proof.

23 44. Under 47 U.S.C. §§ 206 and 207, Plaintiff and Class members are entitled to
24 recover the full amount of damages sustained as a result of MCI's above-described violations,
25 together with reasonable attorney's fees.
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SECOND CAUSE OF ACTION

(Violations of the Communications Act of 1934, 47 U.S.C. § 202)

45. Plaintiff hereby incorporates by reference and realleges each of the foregoing paragraphs as if fully set forth herein, and further alleges as follows:

46. Plaintiff asserts this claim against MCI on behalf of herself and all Class members for violations of 47 U.S.C. § 202.

47. 47 U.S.C. § 202(a) states in relevant part:

Charges, services, etc. It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

48. MCI has assessed persons who were not MCI customers at any relevant time, including Plaintiff, for charges for telephone service they did not request, authorize, subscribe to, or use. MCI has failed to reverse, refund, or credit back such unauthorized charges to Plaintiff. MCI has reversed, refunded, or credited back charges for telephone service to other persons who were assessed such charges without authorization.

49. MCI has violated 47 U.S.C. § 202(a) by unreasonably discriminating in charges and practices for or in connection with communication service, and by subjecting a class of consumers (namely, those persons who were assessed unauthorized charges for telephone service and for whom MCI failed to reverse, refund, or credit back such charges) to unreasonable prejudice.

50. As a direct and proximate result of MCI's above-described practice of discrimination in violation of 47 U.S.C. § 202(a), Plaintiff and Class members have been injured in an amount to be determined at trial.

51. Under 47 U.S.C. §§ 206, 207, and 406, Plaintiff and Class members are entitled both to recover the full amount of damages sustained as a result of MCI's above-described

1 violations, together with reasonable attorney's fees, and to obtain an order enjoining MCI's
 2 wrongful conduct. Under 47 U.S.C. §§ 151, et seq., Plaintiff and Class members also are
 3 entitled to a judgment declaring that MCI violated the Communications Act of 1934.

4 THIRD CAUSE OF ACTION

5 (Violations of the Communications Act of 1934, 47 U.S.C. § 203)

6 52. Plaintiff hereby incorporates by reference and realleges each of the foregoing
 7 paragraphs as if fully set forth herein, and further alleges as follows:

8 53. Plaintiff asserts this claim against MCI on behalf of herself and all Class members
 9 for violations of 47 U.S.C. § 203.

10 54. 47 U.S.C. §203 states in relevant part:

11 (a) Every common carrier, except connecting carriers, shall, within such
 12 reasonable time as the Commission shall designate, file with the
 13 Commission and print and keep open for public inspection schedules
 14 showing all charges for itself and its connecting carriers for interstate and
 15 foreign wire or radio communication between the different points on its
 16 own system

17 (c) No carrier, unless otherwise provided by or under authority of this Act,
 18 shall engage or participate in such communication unless schedules have
 19 been filed and published in accordance with the provisions of this Act and
 20 with the regulations made thereunder; and no carrier shall (1) charge,
 21 demand, collect, or receive a greater or less or different compensation, for
 22 such communication, or for any service in connection therewith, between
 23 the points named in any such schedule than the charges specified in the
 24 schedule then in effect, or (2) refund or remit by any means or device any
 25 portion of the charges so specified, or (3) extend to any person any
 26 privileges or facilities, in such communication, or employ or enforce any
 27 classifications, regulations, or practices affecting such charges, except as
 28 specified in such schedule.

55. MCI billed Plaintiff and Class members for charges for telephone service they did
 not request, authorize, subscribe to, or use. Members of the Class had no contract with MCI at
 any relevant time. MCI thus has violated 47 U.S.C. § 203(c) by charging, demanding, or

1 collecting compensation under rates and conditions that are not set forth in tariffs or in
2 contracts with the members of the Class and/or charging, demanding, or collecting
3 compensation from persons with whom MCI has no contract of any kind.

4 56. By charging Plaintiff and Class members with whom it has no contract, for
5 services that were neither requested from nor provided by MCI, MCI has violated 47 U.S.C.
6 § 203(c)(1) in that it charged, demanded, collected, or received compensation at rates greater or
7 different than the rates specified in its tariffs.

8 57. As a direct and proximate result of MCI's above-described violations of 47 U.S.C.
9 §§ 203(c) and 203(c)(1), Plaintiff and Class members have been injured in an amount to be
10 determined according to proof.

11 58. Under 47 U.S.C. §§ 206, 207, and 406, Plaintiff and Class members are entitled
12 both to recover the full amount of damages sustained as a result of MCI's above-described
13 violations, together with reasonable attorney's fees, and to obtain an order enjoining MCI's
14 wrongful conduct. Under 47 U.S.C. §§ 151, *et seq.*, Plaintiff and Class members also are
15 entitled to a judgment declaring that MCI violated the Communications Act of 1934.

16 **FOURTH CAUSE OF ACTION**
17 **(Unjust Enrichment)**

18 59. Plaintiff hereby incorporates by reference and realleges each of the foregoing
19 paragraphs as if fully set forth herein, and further alleges as follows:

20 60. Plaintiff asserts this claim against MCI on behalf of herself and all Class members
21 for unjust enrichment.

22 61. MCI has assessed Plaintiff and Class members for charges for telephone services
23 they did not request, authorize, subscribe to, or use, and it has collected from Plaintiff and Class
24 members and retained money for such charges. Accordingly, MCI has received, and continues
25 to receive, money at the expense of Plaintiff and Class members.

26 62. MCI has received benefits from Plaintiff and Class members that it has unjustly
27 and inequitably retained at their expense.

63. As a direct and proximate result of MCI's violations of law, Plaintiff and Class members were deprived of the use of their monies that were unlawfully billed, collected, and retained by MCI, and are therefore entitled to restoration of their monies.

REQUEST FOR RELIEF

Plaintiff, on behalf of herself and all others similarly situated, requests the following relief:

- A. An order that this action is properly brought and maintainable as a class action under Rule 23 of the Federal Rules of Civil Procedure, and appointing Plaintiff and her counsel of record to represent the proposed Class;
- B. An order declaring unlawful the acts and conduct of MCI complained of herein;
- C. An order permanently enjoining MCI from engaging in the unlawful acts and conduct complained of herein and any attempts by MCI to collect the erroneous or unlawful charges it has assessed, including the reporting to credit agencies of non-payment of such charges;
- D. An order that MCI withdraw or reverse any adverse reports made to credit agencies in connection with erroneous charges;
- E. An order compelling restitution, disgorgement, and/or other equitable relief as the Court deems proper;
- F. A judgment declaring that MCI violated the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, *et seq.*;
- G. An award of compensatory damages to Plaintiff and the Class, together with an award of consequential and incidental damages and costs suffered by Plaintiff and Class members because of MCI's wrongful conduct;
- H. An award of pre-judgment and post-judgment interest to Plaintiff and the Class;
- I. An award of reasonable attorneys' fees and costs incurred by Plaintiff and the Class in this action, including expert-witness fees; and
- J. Such other relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all claims so triable.

DATED: July 18, 2005

HAGENS BERMAN SOBOL SHAPIRO PLLC

By: 

Robert B. Carey
Stephanie Levin Bozzo
2425 E. Camelback Road, Suite 650
Phoenix, Arizona 85016
Telephone: (602) 840-5900
Facsimile: (602) 840-3012

Grant Woods
GRANT WOODS, PC
1726 North Seventh Street
Phoenix, Arizona 85006
Telephone: (602) 258-2599
Facsimile: (602) 258-5070

Daniel C. Girard
Aaron M. Shearin
Sanjay M. Ranchod
Stefanie G. Bernay
GIRARD GIBBS & De BARTOLOMEO LLP
601 California Street, Suite 1400
San Francisco, California 94108
Telephone: (415) 981-4800
Facsimile: (415) 981-4846

Attorneys for Individual and Representative Plaintiff

Exhibit B

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5
6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
8

9 Shary Everett, on behalf of herself and all)
10 others similarly situated,

11 Plaintiff,

12 vs.

13 MCI, Inc.,

14 Defendant.
15 _____

No. 05-2122-PHX-ROS

ORDER

16
17 This action arises out of charges that were allegedly improperly assessed with respect
18 to local and long distance services provided by Defendant. Pending is Defendant's Motion
19 To Dismiss. (Doc. #11). For the reasons set forth below, the Motion is denied.

20 **I. BACKGROUND**

21 Plaintiff Shary Everett contends that in or around February 2003 MCI assessed her
22 account ("Everett Account") a monthly service charge and related charges in the amount of
23 \$9.88 in connection with an MCI long distance plan that were neither incurred nor
24 authorized. (Doc. #1, ¶25).¹ Plaintiff further alleges that despite several requests to have the
25

26 _____
27 ¹ The account against which these charges were assessed is in Plaintiff's
28 husband's name but is for the telephone number at the residence they share. Plaintiff
contends she is jointly responsible for paying the bill.

1 charges reversed or removed, she received a collections notice in July 2003 for failure to pay
2 the unauthorized charges and subsequently paid them. (Id., ¶¶ 27-29).

3 Defendant's records indicate that in December 2002, MCI received an order from the
4 Local Exchange Carrier ("LEC") for MCI to provide long distance services for the Everett's
5 phone number. (Id., ¶ 7).² This particular order was one where MCI designated itself as the
6 carrier through the LEC during a move. (Id.). Once the account was active with long
7 distance service, it became subject to minimum usage fees as set forth in MCI's Federal
8 Communications Commission ("FCC") Tariff and the MCI General Service Agreement,
9 which is mailed to all customers and is available on its website. (Id.). Such fees were billed
10 on the December 2002 and January 2003 invoices in the total amount of \$9.88. (Id.).
11 Defendant's records further indicate that in February 2003, Plaintiff called to dispute
12 authorization of the account, but did not request a credit. (Id., ¶ 8). MCI's procedure was to
13 advise Plaintiff to contact the LEC to switch services away from MCI in order to cancel her
14 account. (Id., ¶ 9). Three days after Everett's call, MCI received a disconnect order from the
15 LEC and cancelled the Everett Account. (Id.). MCI records do not indicate that the Everetts
16 initiated any other contact. (Id., ¶10).

17 On behalf of herself and others similarly situated, Plaintiff filed a putative class action
18 on July 19, 2005 for violations of the Communications Act of 1934, 47 U.S.C. §§ 151, et
19 seq., ("Communications Act") and for unjust enrichment. (Doc. #1). Plaintiff seeks
20 monetary damages, equitable relief and declaratory relief. Upon filing her lawsuit,
21 Defendant credited the LEC with \$12.00 for the Everett's Account (Doc. #11, Exh. A at ¶11),
22 although the credit did not post to Plaintiff's account until after the Motion For Class
23 Certification was filed. (Doc. #46).

24
25
26 ² Notably, only a LEC, and not a long distance carrier such as MCI, can switch
27 a customer's long distance provider from one carrier to another. (Doc. #11, p. 4). All
28 changes made to service, including switching the designated long distance carrier, are
transmitted by the LEC to the appropriate long distance carrier.

1 Plaintiff is a resident of Goodyear, Arizona. Defendant MCI, Inc. is a Delaware
 2 corporation providing local and long distance telephone service to customers in Arizona and
 3 throughout the United States, and maintains offices within the State of Arizona. Because this
 4 case involves a federal question under the Communications Act, the Court has jurisdiction
 5 pursuant to 28 U.S.C. § 1331 over the federal claim, and supplemental jurisdiction pursuant
 6 to 28 U.S.C. § 1367 over the state law claim. (Doc. #1).

7 On September 29, 2005 Defendant MCI filed a Motion To Dismiss. (Doc. #11).
 8 Plaintiff responded on October 31, 2005 (Doc. #12), and Defendant replied on November 15,
 9 2005. (Doc. #16). On April 26, 2006 the Court held oral argument and ordered
 10 supplemental briefing.³ On May 26, 2006 the parties filed simultaneous supplemental briefs
 11 (Doc. #38, Defendant's Supplemental Brief; Doc. #39, Plaintiff's Supplemental Brief), and
 12 on June 9, 2006 simultaneous opposition briefs were filed (Doc. #46, Defendant's Opposition
 13 Brief; Doc. #48, Plaintiff's Opposition Brief) followed by simultaneous replies filed on June
 14 23, 2006. (Doc. #51, Defendant's Reply In Support of Its Supplemental Brief; Doc. #52,
 15 Plaintiff's Reply In Support of Its Supplement Brief).

16 **II. DISCUSSION**

17 **A. Legal Standard**

18 Defendant argues that the Court should dismiss Plaintiff's claim pursuant to Rule
 19 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction
 20 because (1) it is moot,⁴ and (2) Plaintiff's claims fall within the primary jurisdiction of the
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22 ³ The Court ordered supplemental briefing on the following issues: (1) whether
 23 Manson v. MCI, Inc. and Telecom USA, Inc., Case No. 04-73374 (E.D. Mich. Feb. 24,
 24 2005), is controlling in this case; (2) whether it is disputed that Plaintiff has received all
 25 damages; (3) whether it is determinative that Plaintiff alleges fraud; (4) whether or not the
 court's application of the "picking-off" doctrine in Manson is distinguishable; (5) whether the
 potential class members may be transitory such that there is a likelihood of repetition.

26 ⁴ Defendant also argues that Plaintiff lacks standing, because the Everett account
 27 was in her husband's name. (Doc. #38, p. 2 fn 1). The cases on which Defendant relies do
 28 not support its contention that Plaintiff lacks standing to sue over charges assessed to an
 account for which she is jointly responsible. Ms. Everett paid the debts from a joint checking

1 Federal Communications Commission ("FCC"). Plaintiff, as the party seeking to invoke the
 2 jurisdiction of the court, bears the burden of establishing subject matter jurisdiction. See
 3 McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182-83 (1936); Fenton v.
 4 Freedman, 748 F.2d 1358, 1359 (9th Cir. 1994). A Rule 12(b)(1) motion to dismiss for lack
 5 of subject matter jurisdiction may be either a facial or a factual challenge. When the moving
 6 party challenges jurisdiction based on the allegations in the complaint, the court must
 7 consider all the allegations in the complaint as true, and will not look beyond the face of the
 8 complaint to determine jurisdiction. See Mortensen v. First Fed. Sav. & Loan Ass'n, 549
 9 F.2d 884, 891 (3d Cir. 1977).

10 On the other hand, when a court reviews a complaint under a factual challenge, the
 11 allegations have no presumptive truthfulness, Ritza v. International Longshoremen's and
 12 Warehousemen's Union, 837 F.2d 369 (9th Cir. 1988) (quoting Mortensen, 549 F.2d at 891),
 13 and the court is not limited to the allegations in the pleadings if the "jurisdictional issue is
 14 separable from the merits of [the] case." Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th
 15 Cir. 1987). Rather, the court weighing the evidence has discretion to allow affidavits,
 16 documents, and even a limited evidentiary hearing to resolve disputed jurisdictional facts.
 17 See Valdez v. United States, 837 F. Supp. 1065, 1067 (E.D. Cal. 1993), aff'd, 56F.3d 1177
 18 (9th Cir. 1995), Mortensen, 549 F.2d at 891.

19 **B. Analysis**

20 **1. Mootness**

21 Defendant contends that Plaintiff's claim is moot, because it credited Plaintiff for all
 22 of her alleged damages plus interest, and as a result, there is no actual, ongoing controversy.

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 26 account she shared with her husband (Doc. #39, p.5; Everett Decl., ¶4), and has suffered an
 27 economic injury for which she has standing to sue. See San Diego County Gun Rights
 28 Comm. v. Reno, 98 F.3d 1121, 1130 (9th Cir. 1996) ("Economic injury is clearly a sufficient
 basis for standing"). Moreover, it appears that Ms. Everett was authorized to make changes
 to the account on behalf of her husband. (Doc. #38, Exh. A).

(Doc. #11, Exh. A, ¶ 11).⁵ Plaintiff argues that Defendant's attempt to satisfy her claim shortly after it was filed, and before she could file a Motion for Class Certification, is an attempt to "pick-off" her claim and should not be subject to the mootness limitation.

Article III of the United States Constitution requires a plaintiff to present an actual case or controversy, which is a prerequisite to the Court's exercise of subject matter jurisdiction. See American-Arab Antidiscrimination Comm. v. Thornburgh, 940 F.2d 445, 448 (9th Cir. 1991). The doctrine of mootness is derived from the case-or-controversy limitation. See Gator.com Corp. v. L.L. Bean, Inc., 398 F.3d 1125, 1128-29 (9th Cir. 2005). A live controversy must persist throughout all stages of the litigation. See id. When this condition is not met, the case has become moot and is no longer within the Court's constitutional purview. Id.

In most cases, a case becomes moot when a defendant offers to satisfy the plaintiff's requested relief. Holstein v. City of Chicago, 29 F.3d 1145, 1147 (7th Cir. 1994). But, when the plaintiff attempts to represent a class, the mootness doctrine is somewhat different. See Bd. of School Comm'rs v. Jacobs, 420 U.S. 128, 129 (1975); Kuahulu v. Employers Ins. of Wausau, 557 F.2d 1334, 1336 (9th Cir. 1977). The application of the mootness doctrine depends on the idiosyncrasies of each case and "does not require an automatic dismissal in every case where the district court has failed to certify the class before the representative's claim has become moot." Kuahulu, 557 F.2d at 1336. A plaintiff whose claims have been satisfied and are no longer active may avoid dismissal by showing that the claims are nonetheless "capable of repetition, yet evading review." Sosna v. Iowa, 419 U.S. 393, 401-02 (1975). Application of this exception to the mootness doctrine is limited to situations where "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining

⁵ Plaintiff's request for costs and interest does not create a case or controversy. See Bank of Marin v. England, 385 U.S. 99, 111 n. 1 (1966) (Fortas, J., dissenting) (citations omitted). Nor does Plaintiff's claim for attorneys' fees save an otherwise moot case. See Lewis v. Continental Bank Corp., 494 U.S. 472, 480 (1990).

1 party will be subject to the same action again." Weinstein v. Bradford, 423 U.S. 147 (1975).
2 In addition, the Supreme Court has held, "Requiring multiple plaintiffs to bring separate
3 actions, which effectively could be 'picked off' by a defendant's tender of judgment before
4 an affirmative ruling on class certification could be obtained, obviously would frustrate the
5 objectives of class actions; moreover it would invite waste of judicial resources by
6 stimulating successive suits brought by others claiming aggrievement." Deposit Guaranty
7 Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980). Where a named plaintiff's claims become
8 moot before the court certifies a class, the class certification motion is deemed to relate back
9 to the named plaintiff's standing when she filed the class complaint. See, Wade v. Kirland,
10 118 F.3d 667, 670 (9th Cir. 1997). The "relation-back" exception applies where the claims
11 are transitory or acutely susceptible to mootness as a result of the defendant's effort to pick
12 them off. See, e.g., id; Weiss v. Regal Collections, 385 F.3d 337, 347-48 (3d Cir. 2004).

13 Defendant cites two cases involving similar facts in which courts have dismissed the
14 action on grounds of mootness where the claims were satisfied before the court certified the
15 class action. In Manson v. MCI, Inc. and Telecom USA, Inc., Case No. 04-73374 (E.D.
16 Mich. Feb. 24, 2005), aff'd by the Sixth Circuit without opinion on April 25, 2006 (Doc. #36,
17 Exh. A), the court held that there was no case or controversy over plaintiff's moot claims
18 where MCI issued a credit to plaintiff in an amount equal to or greater than the potential
19 damages.⁶ The court rejected plaintiff's argument that defendants were attempting to "pick
20 off" the claims with settlement offers in an attempt to avoid a class action, because the
21 motion for class certification had not yet been filed. Defendant argues that like Manson, at

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25 ⁶ Although Sixth Circuit Rule 28(g) disfavors the "[c]itation of unpublished
26 decisions in briefs and oral arguments in this Court and in the district courts within this
27 Circuit, except for the purposes of establishing res judicata, estoppel, or the law of the case,"
28 Defendant is not prohibited from citing the case in this Circuit. Contrary to Defendant's
assertion that the Sixth Circuit's oral disposition "compels dismissal of this case" (Doc. #38,
p. 2), the Sixth Circuit decision is not binding on this Court.

1 the time MCI credited Plaintiff's account, no Motion For Class Certification had been filed.⁷

2 Like Manson, Plaintiff's claim was satisfied before the motion for class certification
3 had been filed.⁸ Manson is distinguishable on other grounds, because the defendants in that
4 case agreed to institute a recovery program to determine what other class members were
5 entitled to the same credit afforded plaintiff such that all claims would be moot, therefore
6 alleviating any concerns that there would be repetitious claims. Here, MCI has not offered
7 to credit other putative plaintiffs who were also improperly charged. At oral argument, MCI
8 contended that based on the factual circumstances in Manson, it was easier to rectify the
9 wrong, whereas here, the alleged wrong is based on incorrect information MCI receives from
10 the LEC. MCI further contends that through its liberal credit policy, all putative plaintiffs
11 who requested a credit received one. Under this reasoning, however, MCI has placed the
12 burden on the putative plaintiff to contact MCI and not only identify herself as an account
13 holder whose account was improperly charged, but also request a credit. If a putative
14 plaintiff fails to do so, perhaps because she is unable to reach a live person through the
15 automated customer service line, then the putative plaintiff is deemed to have accepted the
16 services. MCI's policy does not sufficiently rectify the problem or alleviate this Court's
17 concern over future claims.

18 Defendant also cites to Labora v. MCI Telecommunications Corp., No. 98-1073 (S.D.
19 Fl. July 20, 1998), in which the plaintiff filed a class action alleging improper and duplicative
20 billing practices.⁹ Plaintiff, a customer, did not contact MCI's customer service center to
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22 ⁷ Plaintiff filed a Motion For Class Certification on May 30, 2006 (Doc. #43).

23 ⁸ Although Defendant issued a credit to the LEC before Plaintiff filed its Motion
24 For Class Certification, the credit did not post to Plaintiff's account until after the Motion was
25 filed. (Doc. #46). Whether the claim was mooted on the date the credit was issued or the
26 date the credit appeared is immaterial, as this Court rejects the brightline rule that focuses
solely on the date on which the motion for class certification was filed.

27 ⁹ Like the Sixth Circuit's disposition in Manson, the Eleventh Circuit's summary
28 affirmance in Labora has no precedential value. See 11th Cir. R. 36-1.

1 inquire about the calls and instead filed a class action complaint. Upon receipt of the
2 complaint, however, MCI refunded the plaintiff the total alleged duplicate charges of \$1.52
3 and moved to dismiss the complaint as moot. The court held that this credit mooted
4 plaintiff's cause of action and rendered him ineligible to represent the class, and also held that
5 his request for costs and interest did not salvage the otherwise moot case. It was upheld with
6 no written opinion by the Eleventh Circuit.

7 This case is also distinguishable, because in Labora, the court found relevant that prior
8 to the filing of the lawsuit, MCI had no notice that it had improperly charged the plaintiff.
9 The fact that MCI credited the plaintiff shortly after the complaint was filed was more
10 indicative of an intent to rectify an error upon receiving notice than of any intent to "pick-
11 off" the plaintiff's claim. In this case, Plaintiff notified Defendant that she did not authorize
12 initiation of services well before filing suit. Defendant argues that its policy prevented it
13 from issuing a credit until Plaintiff specifically requested one, which its records indicate
14 Plaintiff did not do at the time she called to inquire about the charges. Defendant further
15 contends that the fact it credited Plaintiff pursuant to its internal policy is evidence that it is
16 not intending to "pick off" her claim. The basis for the refund is immaterial, however, where
17 unlike Labora, Defendant was on notice beforehand but did not act until after the lawsuit was
18 filed. Moreover, it is these very policies and practices that are issue in this lawsuit.

19 Plaintiff cites the Third Circuit decision, Weiss v. Regal Collections, 385 F.3d 337,
20 344 (3d Cir. 2004), as support for its argument that mootness should not apply. Weiss
21 involved a plaintiff who, within six weeks of filing his amended complaint and before filing
22 a motion for class certification, was made an offer of judgment by defendant under Fed. R.
23 Civ. P. 68 for the amount of statutory damages plus attorneys' fees and costs. The plaintiff
24 declined the offer of judgment, and the district court granted the defendant's motion to
25 dismiss on grounds of mootness. Id. at 340. In reversing the district court's opinion, the
26 Third Circuit held that the defendant's offer of judgment, which provided complete relief to
27 Weiss but not to the class, would not be given effect, because to allow the defendant to make
28 an offer of judgment to a named plaintiff prior to class certification would undermine the

1 purposes of Rule 23. Id. at 345. The Third Circuit cited precedent for its holding that a class
2 action would not be moot if a trial court lacked the opportunity to rule on a pending motion
3 for class certification when a defendant made an offer of judgment. Id. at 346 (citing Susman
4 v. Lincoln Am. Corp., 587 F.2d 866, 869-71 (7th Cir. 1978); Zeidman v. J. Ray McDermott
5 & Co., 651 F.2d 1030, 1051 (5th Cir. 1981); Lusardi V. Xerox Corp., 975 F.2d 964, 975 (3d
6 Cir. 1992)). In rejecting a brightline rule followed by other courts, the Third Circuit instead
7 focused on whether the plaintiff had unduly delayed in moving for certification; it held that
8 plaintiff had not delayed, and as a result, found the case was not moot. See id. at 348.

9 This is an issue of first impression in the Ninth Circuit, whether a claim is rendered
10 moot where plaintiff's damages are satisfied not only before a court has ruled on a motion for
11 class certification, but before plaintiff has even filed such a motion. Defendant seeks
12 adoption of a brightline rule focusing solely on whether a motion for certification was filed
13 at the time plaintiff's damages were satisfied.

14 Defendant attempts to distinguish this case from Weiss by claiming that its credit was
15 not an offer of judgment made pursuant to Fed. R. Civ. P. 68. Regardless of whether it was
16 issued as part of a formal settlement offer or not, Defendant's credit satisfied Plaintiff's claim;
17 thus, for purposes of mooted Plaintiff's claim, it is the same as an offer of judgment. To
18 hold otherwise would permit a defendant to circumvent the practical considerations
19 underlying the court's reasoning in Weiss, as well as subsequent cases, which speak most
20 closely to the issues at hand while recognizing the modifications to Fed. R. Civ. P. 23 in 2003
21 allowing for more time to file for certification. Creating a brightline based on whether the
22 claim was satisfied before the filing of the class certification motion would necessitate that
23 putative plaintiffs seek class certification on the date a complaint is filed or immediately
24 thereafter in order to preserve their claim; similarly, it would encourage defendants to "race
25 to pay off" named plaintiffs very early in the litigation before a motion for class certification
26 is filed, which is inconsistent with the purposes of Rule 23. Liles v. American Corrective
27 Counseling Servs., Inc., 201 F.R.D. 452, 455 (S.D. Iowa 2001); Schaaake v. Risk
28 Management Alternatives, Inc., 203 F.R.D. 108 (S.D.N.Y. 2001) ("Taken to its absurd

logical conclusion, the policy urged by defendant would also allow defendants to essentially opt-out of Rule 23, by allowing a defendant to avoid liability for class wide relief, which could be prevented by the mere service of a Rule 68 offer at the outset of the case."); Nasca v. GC Servs. Ltd. P'ship, 01 Civ. 10127 (DLC), 2002 U.S. Dist. LEXIS 16992, at *9 (S.D.N.Y. Sept. 13, 2002) ("To allow a Rule 68 offer to moot a named plaintiff's claim in these circumstances [where an offer of judgment was made less than two months after defendant filed its answer] would encourage defendants to pick off named plaintiffs in the earliest stage of the case."); Bond v. Fleet Bank (RI), N.A., C.A. No. 01-177 L, 2002 U.S. Dist. LEXIS 4131, at *21-22 (D.R.I. Feb. 21, 2002) ("To permit Fleet to intentionally moot Bond's claims, before Bond had an opportunity to move for class certification, in an effort to avoid a class action, would do violence to the interests of justice."); David Hill Koysza, Preventing Defendants From Mooting Class Actions By Picking Off Named Plaintiffs, 53 Duke L.J. 781, 781-82 (Nov. 2003) (an offer of judgment to named plaintiffs before class certification "both thwarts the function of the class action device and vitiates the policies behind it"). Though Weiss involved an offer of judgment, the Court finds the Third Circuit's reasoning to be persuasive and rejects the brightline rule in favor of an approach that permits sufficient time to allow Rule 23 to play out.

Another inquiry is whether Plaintiff engaged in "undue delay" in not filing the Motion For Class Certification before the claim was satisfied. MCI credited the Plaintiff's account via the LEC only seven weeks after she filed her Complaint. Defendant had not answered or even moved against the Complaint; thus, Plaintiff had not had a reasonable opportunity to move for class certification at that time. In addition, unlike Manson where the court believed that the entire class action would be moot, because MCI indicated that it was in the process of "identify[ing] all customers incorrectly billed [and crediting] those accounts in full for any over-billing," Manson, slip op. at 8, MCI here has made no such effort. The Court has strong concerns that to render Plaintiff's claims moot would only result in repetitious claims.

2. Primary Jurisdiction

1 Alternatively, Defendant argues that Plaintiff's claims should be dismissed, because
2 the FCC has primary jurisdiction over the claims. "Primary jurisdiction is not implicated
3 simply because a case presents a question, over which the FCC could have jurisdiction . . .
4 . Rather, primary jurisdiction is properly invoked when a case presents a far-reaching
5 question that 'requires expertise or uniformity in administration.'" Brown v. MCI WorldCom
6 Network Serv's, Inc., 277 F.3d 1166, 1172 (9th Cir. 2002) (citations omitted). In considering
7 whether to dismiss a federal action based on primary jurisdiction, courts have considered four
8 factors: (1) whether the question at issue is within the conventional expertise of judges; (2)
9 whether the question at issue lies particularly within the agency's discretion or whether it
10 requires the exercise of agency expertise; (3) whether there exists a substantial danger of
11 inconsistent rulings; and (4) whether a prior application to the agency has been made. See
12 Total Telecomm. Servs., Inc. v. Am. Tel. & Telegraph Co., 919 F. Supp. 472, 478 (D.D.C.
13 1996). "A court 'should be reluctant to invoke the doctrine of primary jurisdiction, which
14 often, but not always, results in added expense and delay to litigants . . .'" McDonnell
15 Douglas Corp., 751 F.2d 220, 224 (8th Cir. 1984) (citations omitted).

16 This Court need not decide whether the alleged unlawful charges were reasonable, but
17 rather whether MCI's decision to assess the fee to non-customers was part of a deceptive
18 scheme. Plaintiff's allegations of consumer fraud are well within the competence of this
19 Court. See Nadar v. Allegheny Airlines, Inc., 426 U.S. 290, 305-06 (1976) ("The standards
20 to be applied in an action for fraudulent misrepresentation are within the conventional
21 competence of the courts, and the judgment of a technically expert body is not likely to be
22 helpful."). Moreover, other courts have rejected such attempts to refer jurisdiction over cases
23 involving similar issues. See Brennan v. AT&T Corp., No. 04-CV-433, 2006 U.S. Dist.
24 LEXIS 8237, at *4 (S.D. Ill. Feb. 8, 2006) (rejecting defendant's argument to refer
25 jurisdiction over underlying claim that defendant deliberately charged improper non-usage
26 fees) (Doc. #20, Exh. A). Contrary to Defendant's assertion that the FCC has an interest in
27 adjudicating this matter, its recent Report and Order and Further Notice of Proposed
28 Rulemaking, which addresses the problem of LECs providing incorrect information to long

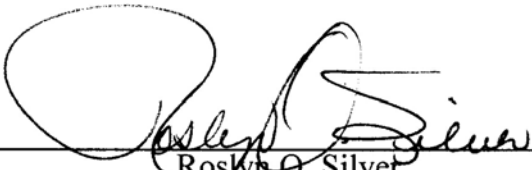
1 distance carriers such as MCI contains no such indication. (Doc. #11, Exh. B&C).
2 Moreover, the Rulemaking did not address the issue raised in this action, which is whether
3 Defendant violated the Communications Act after obtaining data from the LECs by
4 establishing accounts and enrolling consumers in billing plans with MUFs without customer
5 authorization. For these reasons, a referral would be improper.

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7 Accordingly,

8 IT IS ORDERED that Defendant's Motion To Dismiss (Doc. #11) is denied.

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10 DATED this 29th day of September, 2006.

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Roslyn O. Silver
United States District Judge